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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FERNANDEZ INNOVATIVE TECHNOLOGIES,)
L.L.C.,)
Plaintiff,)
vs.) No. 07 C 1397
GENERAL MOTORS CORPORATION, et al.,) Chicago, Illinois
Defendants.) May 15, 2008
9:47 A.M.

TRANSCRIPT OF PROCEEDINGS - Motions
BEFORE THE HONORABLE MARIA VALDEZ, Magistrate Judge

APPEARANCES:

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NOTE: Please notify of correct speaker identification.

1 (Proceedings held in open court:)

2 THE CLERK: 07 C 1397, Fernandez Innovative
3 Technologies, L.L.C. versus General Motors Corporation, et al.,
4 plaintiff's motion to file under seal motion to compel and for
5 discovery sanctions and exhibits, plaintiff's motion to compel
6 and for discovery sanctions.

7 MR. VICKREY: Good morning, your Honor. Paul Vickrey
8 and Tahiti Arsulowicz for the plaintiff.

9 MS. CUNNINGHAM: Good morning, your Honor. Tiffany
10 Cunningham and Craig Leavell for the defendants.

11 THE COURT: All right. Good morning.

12 First let's deal with plaintiff's motion for leave to
13 file under seal.

14 Is there any objection?

15 MS. CUNNINGHAM: No, your Honor.

16 THE COURT: All right. That motion will be granted.
17 Plaintiffs to provide the Court with the unredacted
18 versions as soon as possible.

19 MR. VICKREY: Certainly, your Honor.

20 THE COURT: Do we want a briefing schedule on the
21 motion to compel?

22 MS. CUNNINGHAM: I think, your Honor, there are
23 certain issues we could resolve right here. But to the extent
24 your Honor wants to consider granting any of their issues, we
25 would request a briefing schedule.

1 THE COURT: Well, I don't have the unredacted
2 versions, so I'm not prepared to deal with the motion itself
3 today. What we can do is if you want to come in and just argue
4 it or I can give you a week to respond.

5 MR. LEAVELL: But if you have got five minutes now, we
6 think we could work it out with your assistance, at least some
7 of the issues. If you don't have five minutes, we can brief
8 it.

9 THE COURT: All right.

10 MR. LEAVELL: (Unintelligible) brief.

11 THE COURT: Why don't you go ahead and just step down
12 and let me deal with the other matters, and then we can handle
13 it.

14 MR. LEAVELL: Thank you.

15 THE COURT: All right. Thank you.

16 MS. CUNNINGHAM: Thank you, your Honor.

17 MR. VICKREY: Thank you.

18 (Whereupon the Court turned her attention to other matters
19 on her call.)

20 THE CLERK: 07 C 1397, Fernandez Innovative
21 Technologies, L.L.C. versus General Motors Corporation, et al.,
22 plaintiff's -- recall on plaintiff's motion to file under seal
23 and plaintiff's motion to compel for discovery sanctions.

24 MR. VICKREY: Your Honor, Paul Vickrey and Tahiti
25 Arsulowicz again for the plaintiff.

1 Briefly, if -- I'm not sure if your Honor has had a
2 chance to read the unredacted version, which is -- there is
3 very little redacted in the motion.

4 But the centerpiece of the motion is that the
5 defendants repeatedly on four separate occasions, have produced
6 documents, key documents either the day before while counsel
7 was on a plane traveling to a deposition, and sometimes right
8 during the deposition the key documents.

9 So we spend time rummaging through irrelevant
10 documents in preparation for the deposition. They ambush us
11 with documents the morning of the deposition.

12 At first I thought, well, maybe the first time they
13 are just trying to take advantage of a first-year associate,
14 but this is a pattern. It is a litigation strategy. It
15 subverts the deposition process.

16 Among other things we're asking as sanction, a limited
17 sanction, that the last deponent -- this happened just, what, a
18 week ago -- be brought back from Detroit to Chicago for a
19 deposition at defendants's expense and that defendants be
20 ordered to produce documents in sufficient time in advance of
21 the deposition so we don't have this pattern of surprise
22 documents and subverted deposition preparation.

23 We are also --

24 THE COURT: And the last deposition was Mr. Young?

25 MS. ARSULOWICZ: Yes.

1 THE COURT: All right.

2 MR. VICKREY: And we're also seeking, your Honor, an
3 order compelling the defendants to produce a certain category
4 of documents, and Ms. Arsulowicz will address that.

5 MS. ARSULOWICZ: The -- in addition to the documents
6 before a deposition, we repeatedly asked for financial
7 documents from defendants OnStar and General Motors. We first
8 asked them about a year ago, on May 30th, 2007.

9 And there are kind of two aspects to this. One is
10 that they produced summary documents of their financial records
11 in the first deposition. We told them during the deposition we
12 wanted the originals as they are kept in the ordinary course of
13 business. And we also told them in a letter after the
14 deposition we wanted the original documents, not just their
15 limited summary document. We also told them in a meet and
16 confer.

17 And we still haven't got these documents. So that's
18 why we are coming to your Honor on that.

19 We have also asked repeatedly for forecasting
20 documents related to the financial aspects.

21 So we have tried, we have begged, we have pleaded, we
22 have done everything we think we can to get these documents,
23 and that's why we're here.

24 THE COURT: All right.

25 MS. CUNNINGHAM: Okay. Your Honor, I think there are

1 certain issues we can resolve pretty readily here if you have
2 the time to listen.

3 First, just referring to these financial documents in
4 particular that they just described, the parties in this
5 particular case have a joint stipulation that has been signed
6 by counsel for both parties and entered by the court.

7 I have a copy here I can pass up to you if that would
8 be helpful.

9 THE COURT: Ms. Pagan and I can review it.

10 (Brief interruption.)

11 THE COURT: Thank you.

12 MS. CUNNINGHAM: In particular on this joint
13 stipulation, if you turn to the tab page -- paragraph 7, at the
14 joint stipulation on page 3, it provides that the party can
15 provide only summary financial information, which is what was
16 provided on behalf of GM and OnStar in accordance with this
17 stipulation.

18 THE COURT: But let me just ask you though, the --
19 paragraph 7 also says the parties will meet and confer to
20 discuss the parameters of production of underlying documents.
21 Presumably one side requests it.

22 Does the stipulation set out a procedure for any
23 resolution on that?

24 MS. CUNNINGHAM: No, your Honor, it does not state a
25 specific procedure. But the parties have met and conferred,

1 and in particular an exhibit that was attached to the
2 unredacted version of the motion we last stated to them that we
3 are continuing to work to get an answer on that and we would
4 respond to them further.

5 However, the party did not wait for a response from us
6 because we were working on giving some of the underlying
7 documentation and instead filed this motion.

8 THE COURT: All right. Give me an idea of what the
9 discovery schedule is. You have taken a number of depositions.

10 MS. CUNNINGHAM: Uh-huh.

11 THE COURT: How many other depositions need to be
12 taken now?

13 MS. CUNNINGHAM: I believe they have two more.

14 MS. ARSULOWICZ: Two more.

15 THE COURT: And who are the deponents?

16 MS. ARSULOWICZ: There is two financial 30 -- or one
17 is an individual, one is a 30(b)(6) for GM and OnStar. Two
18 technical --

19 MS. CUNNINGHAM: They are technical witnesses, not
20 financial.

21 MS. ARSULOWICZ: And we also request Mr. Young for
22 further.

23 THE COURT: For a continuing deposition?

24 MS. ARSULOWICZ: Yes.

25 THE COURT: All right. So we have got two plus

1 Mr. Young.

2 MS. ARSULOWICZ: Yes.

3 THE COURT: And you have fact discovery cutoff at the
4 end of the month.

5 MS. CUNNINGHAM: That's correct, your Honor.

6 MS. ARSULOWICZ: Yes.

7 MS. CUNNINGHAM: And in addition to --

8 THE COURT: One other question that I didn't glean
9 from the motion. When did you -- you file or you propound a --
10 document productions. When did they respond? How much time
11 has intervened between the time that we have had these
12 depositions and their production, their official production? I
13 know your argument is they have been rolling in some documents.

14 MS. ARSULOWICZ: I'm sorry, you're asking for the time
15 between?

16 THE COURT: Their response to the document production
17 request that you made. When did that occur?

18 MS. ARSULOWICZ: Well --

19 THE COURT: The bulk of it.

20 MS. ARSULOWICZ: The bulk of it -- well, I mean, we
21 asked them directly after the deposition. And then the last
22 time was a meet and confer on April 25th. They have continued
23 to state that unless we give them a good reason, they are not
24 going to give us these financial documents.

25 And, your Honor, honestly in a deposition of a Toyota

1 witness, one of the witnesses cited -- or I asked her about a
2 document that said, GM and OnStar hide the costs of the
3 hardware costs of OnStar. And I asked her to, you know, kind
4 of explain what that document meant. And she couldn't figure
5 it out. And they are a licensee of OnStar. And she didn't
6 know how to break down the financial aspects.

7 And we're certain that our client's interest will be
8 compromised if we don't receive these underlying documents.

9 THE COURT: Okay.

10 MR. LEAVELL: Your Honor, if I may, just briefly. I
11 was the attorney that handled the first deposition that they
12 are talking about where we provided the financial details of
13 the OnStar information at the morning of the deposition.

14 This is a 30(b)(6) deposition. The witness the day
15 before the deposition did what he was supposed to do to prepare
16 to testify on 30(b)(6) topics. He went around, he
17 investigated, he talked to people. And, of course, he found
18 more information that went to the issue of damages.

19 He pulled some data dumps from the database that
20 includes the financial information and gave them exactly what
21 they need for this case, exactly what they were looking for in
22 a nice chart.

23 During the deposition they ask, well, do you have this
24 information in any other way? And he said, well, there are
25 occasionally monthly reports that get circulated in meetings.

1 But those are just informal monthly reports just to keep the
2 people up to date on how OnStar is doing.

3 This is -- what we gave them was the official database
4 printout of the ordinary information as it is kept and limited
5 to the (unintelligible) specific information relevant to the
6 accused feature of OnStar. We --

7 THE COURT: Well, let -- let me ask. I presume, and
8 not knowing, this is a presumption, that there was a document
9 production request --

10 MR. LEAVELL: Yes.

11 THE COURT: -- made. And when was that production
12 request made?

13 MR. LEAVELL: I think the request of the documents
14 about mid '07.

15 THE COURT: Mid '07.

16 MR. LEAVELL: We produced 300,000 pages of documents
17 and millions of pages of source code for them to review. They
18 have reviewed those documents for a year. We heard nothing
19 about any complaints or any follow up for any documents.

20 THE COURT: And the document production request
21 included this summary financial information.

22 MR. LEAVELL: Yes, but not the forecasts which --

23 THE COURT: Right.

24 MS. CUNNINGHAM: Three are separate issues then.

25 MS. ARSULOWICZ: We disagree, but --

1 THE COURT: All right. So let's, for sake of this
2 argument, let's segregate out the forecast documents.

3 MR. LEAVELL: Right.

4 THE COURT: You said that the 30(b)(6) witness
5 undertook a review and had additional documents.

6 MR. LEAVELL: Correct.

7 THE COURT: Now one of the questions, of course, is
8 whether or not you initially undertook a reasonable review so
9 that these documents should have been produced earlier.

10 MR. LEAVELL: Right. We did, your Honor, and some of
11 this information was produced. The statement in the brief that
12 there was no financial information produced, there was some.

13 But also we didn't know when they filed their
14 infringement or their document requests what the accused
15 features were. They have been changing throughout the case.
16 And so when it came time for the deposition, we assumed that we
17 finally understood what they were accusing of infringement.

18 OnStar has 20 different features. They have shifted
19 and changed their allegations throughout the case.

20 Once we knew what -- and we assumed that now that they
21 are taking depositions, they are going to stick with these
22 allegations. We made sure to download and to produce the
23 relevant information on the relevant features, how many people
24 used the features each month, how much people pay for the
25 service, the -- the relevant information in a very simple to

1 use form and gave it to them at the deposition.

2 THE COURT: So you haven't had a Markman hearing.

3 MR. LEAVELL: We have had a hearing, but no order yet.

4 THE COURT: Oh, right. No order yet.

5 And I don't know if Judge Kendall requires a claim
6 construction chart. Was one done for that hearing?

7 MS. ARSULOWICZ: Yes, it was, your Honor.

8 THE COURT: All right. So --

9 MR. LEAVELL: And then at the Markman hearing they
10 changed their allegations again.

11 THE COURT: All right. So I was going to ask you,
12 usually you know pretty much what's going to be at issue.

13 MR. VICKREY: Your Honor, if I may, because I handled
14 the Markman hearing, what we did is we reduced the scope of the
15 accused functionalities of OnStar. So that could not possibly
16 be an excuse as to why repeatedly at every single deposition
17 we're getting documents produced in Chicago the day before or
18 the morning of a deposition out of town when counsel is
19 traveling to these depositions.

20 So this -- the notion that they have been acting,
21 well, you know, we are just doing our job, there is a
22 pattern -- if it happens once in a while, I'll forget about
23 it. Twice, I'm concerned. Three times within four times for
24 the only four depositions, I am very concerned.

25 I hate to burden the Court with discovery disputes.

1 That's not my character. And but something has to be done
2 here. And we have two remaining depositions. We need to bring
3 Mr. Young back under these circumstances. And this shouldn't
4 happen again.

5 THE COURT: All right. You indicated earlier that you
6 think that some of this could be resolved --

7 MS. CUNNINGHAM: Yes.

8 THE COURT: -- without any further briefing.

9 MS. CUNNINGHAM: I do, your Honor.

10 THE COURT: Let's get to the nut of that.

11 MS. CUNNINGHAM: Okay. One of the very easy issues to
12 resolve is the issue with respect to the TMS witness.

13 MR. LEAVELL: This is Number 3 in their --

14 MS. CUNNINGHAM: Number 3 in their brief.

15 MR. LEAVELL: They request four things --

16 MS. CUNNINGHAM: -- as per their request.

17 MR. LEAVELL: -- your Honor. This is Number 3.

18 MS. CUNNINGHAM: Yes, your Honor.

19 And they asked us in particular regarding whether or
20 not we could produce a witness regarding the mylexuslink dot
21 com website. We met and conferred on this issue and went in
22 and further got back to them in writing. And actually it is
23 attached as Exhibit 3 to their brief. I'm not sure if they
24 gave you a copy of it.

25 THE COURT: Well, I don't --

1 MS. CUNNINGHAM: Sorry. But I have a copy here.

2 THE COURT: -- I don't have an unredacted version of
3 anything, so --

4 MS. CUNNINGHAM: I have a copy here.

5 MS. ARSULOWICZ: I have a copy of everything.

6 MS. CUNNINGHAM: And I highlighted (unintelligible).

7 THE COURT: All right. You see what she just gave me,
8 there is some highlighting on it.

9 MS. CUNNINGHAM: That's Exhibit 2 --

10 MS. ARSULOWICZ: Yeah.

11 MS. CUNNINGHAM: -- the motion.

12 In particular here, your Honor, they want to know who
13 is in control of the mylexuslink dot com website. We got back
14 to them in a timely fashion and told them that it is OnStar,
15 not TMS, who is knowledgeable about that website.

16 Accordingly we explained that a TMS witness cannot
17 testify further on that issue, instead they should ask OnStar
18 about this question.

19 Nonetheless they later, after the time that that
20 particular email --

21 THE COURT: Let me stop you. There is a microphone on
22 the podium, and you have the paper over it.

23 MS. CUNNINGHAM: Oh, I'm sorry.

24 THE COURT: We're going to hear this --

25 MS. CUNNINGHAM: I'm sorry.

1 THE COURT: Okay. Go ahead.

2 MS. CUNNINGHAM: Nonetheless after the time of that
3 particular email, they went ahead and filed this motion and
4 asked for that particular relief.

5 MR. LEAVELL: Your Honor, if I may very quickly.

6 THE COURT: Okay.

7 MR. LEAVELL: The issue is they asked Toyota about the
8 Lexus dot com website. The Lexus dot com website is
9 irrelevant. It has nothing to do with the Lexus link feature
10 at issue.

11 The Lexus link feature is run by OnStar. OnStar
12 provides their feature to Toyota, and Toyota calls it Lexus
13 link.

14 They spent a lot of time asking Toyota about that
15 website. The Toyota witnesses said, we don't know anything
16 about it.

17 We have told them that OnStar runs that website, not
18 Toyota. But they still want a witness from Toyota to talk
19 about the website.

20 We have already told them the people they are going to
21 talk to in a few weeks, the technical people at OnStar, can
22 talk about that website. That issue is over.

23 THE COURT: All right. So why doesn't that take care
24 of it? What is your belief at this stage?

25 MS. ARSULOWICZ: Well, your Honor, when we were asking

1 Ms. Avary and Mr. Inouye, the two Toyota witnesses, it was our
2 understanding that that website was run by Toyota and that
3 Michelle Avary was not able to testify as to the technical
4 aspects of the website.

5 And Mr. Inouye then said that Ms. Avary the next day,
6 he told us that Ms. Avary would be able to testify.

7 If we can get a promise from defendants that they will
8 designate -- that they will include the Toyota accused products
9 functionality, and if we can get testimony from an OnStar
10 30(b)(6) technical witness, we'll take that.

11 THE COURT: So you want a representation that the
12 OnStar 30(b)(6) will be able to testify as to the Lexus link
13 function, if there is any, on Toyota cars, is that --

14 MS. ARSULOWICZ: Yes.

15 THE COURT: Is that what --

16 MS. ARSULOWICZ: Yes, that would be acceptable.

17 MR. LEAVELL: Your Honor, if that is what it takes to
18 resolve this, that's fine. They haven't served a 30(b)(6)
19 notice asking for that testimony from OnStar, but we're willing
20 to do it.

21 And, briefly, the questions they were asking were
22 about the Lexus dot com website. When they were talking about
23 Ms. Avary and Mr. Inouye, they were asking about the wrong
24 website. They were confused. We cleared it up.

25 THE COURT: There is two websites.

1 MR. LEAVELL: There is the Lexus that Toyota actually
2 runs.

3 THE COURT: All right.

4 MR. LEAVELL: And then mylexuslink dot com, different
5 domains.

6 MS. CUNNINGHAM: And just to clarify --

7 THE COURT: Counsel has made a representation though
8 that he will ensure that the OnStar 30(b)(6) deponent will be
9 able to testify to the extent that they know on the mylexuslink
10 dot com as it pertains to Toyota.

11 MR. LEAVELL: Right.

12 THE COURT: Is that correct?

13 MR. LEAVELL: Right.

14 THE COURT: All right.

15 MS. CUNNINGHAM: That's correct, your Honor.

16 And then another issue that's pretty easy to resolve,
17 I think, is the forecast issue. If your Honor has had an
18 opportunity to look very briefly at their discovery requests
19 that they propounded, which were included in the unredacted
20 version of the brief --

21 THE COURT: Again I have no unredacted version.

22 MS. CUNNINGHAM: I'm sorry. In the redacted version.
23 They attached it as Exhibits 12 and 13.

24 MR. LEAVELL: That's why I think we're going to have
25 to brief, your Honor, because you're going to have to look at

1 their requests.

2 THE COURT: Yes.

3 MS. CUNNINGHAM: I mean, to the extent I could, I just
4 want to speak very briefly in case it is something that could
5 be resolved readily. But if not, counsel is absolutely correct
6 we can very easily brief that issue.

7 Their interrogatories that they point us to are 12 and
8 13, and it is the redacted version. They attach them as
9 exhibits to that particular brief.

10 12, 13, and 14 that they point to do not mention the
11 word forecast whatsoever. Those particular interrogatories
12 relate to identification of expert witnesses, the factual
13 contentions related to damages, and also the Georgia Pacific
14 factors.

15 Then they point to a series of document requests. And
16 the document requests also do not relate to forecasts; instead,
17 they generally relate to commercialization, marketing and
18 sales, marketing materials, and, again, also expert witnesses.

19 We asked them during the meet and confer, could you
20 point us to a request that actually talks about the forecast
21 that you claim you requested? We looked at the different
22 ones. And as you can also analyze, you'll see that they did
23 not point us to a particular request.

24 Accordingly, that was the reason that we maintained
25 our objection to production of these particular documents.

1 THE COURT: All right.

2 MS. ARSULOWICZ: Your Honor, we maintain that we have
3 asked for these documents.

4 THE COURT: Which request asks for the documents?

5 MS. ARSULOWICZ: Specifically for Document Request
6 Number 47, we asked for underlying documents for an expert and
7 any expert testimony. And it is -- if you are talking about a
8 damages expert, one of the most relevant factors in the
9 hypothetical negotiation for a patent licensing -- licensing
10 would be forecasting. We -- we feel that's covered by that
11 request.

12 THE COURT: So I heard you say Document Request 47,
13 and there was another one. Do you have a number for that?

14 MS. ARSULOWICZ: We have --

15 THE COURT: So I can review it.

16 MS. ARSULOWICZ: Yes. We --

17 MS. CUNNINGHAM: I have a copy if you want.

18 MR. LEAVELL: Your Honor, do you have a copy of it?

19 THE COURT: I don't, but --

20 MS. ARSULOWICZ: We have a list.

21 THE COURT: I'm not sure I can resolve it today
22 anyway.

23 MS. ARSULOWICZ: Okay.

24 I mean, it is -- let me see here.

25 It is in our brief, but we -- we think that that

1 request specifically completely covers that information. I --

2 MS. CUNNINGHAM: I can hand up a copy if your Honor
3 would like to see it.

4 THE COURT: You can provide it to Ms. Pagan.

5 But let me ask you, what's your expert discovery
6 schedule here?

7 MR. LEAVELL: It is going to hinge off the Markman
8 order, which we don't have yet.

9 THE COURT: Right.

10 MS. ARSULOWICZ: That's going to be --

11 THE COURT: So it is going to follow after Markman.

12 MS. ARSULOWICZ: And so next no expert reports have
13 been submitted at this time, your Honor.

14 THE COURT: Apart from it being relevant to an expert
15 document request, is there another document request that you
16 believe would require the production of forecast information?

17 MS. ARSULOWICZ: We have outlined the document
18 Requests 23, 25, 41, 46, and 47.

19 MS. CUNNINGHAM: And I have copies of that, to the
20 extent you wanted to review, your Honor.

21 THE COURT: Why don't you go ahead and provide that to
22 me.

23 MS. ARSULOWICZ: Sure. Of course, your Honor.

24 (Brief interruption.)

25 MS. CUNNINGHAM: I won't give you the whole document

1 but --

2 MR. LEAVELL: Your Honor, here is a copy with the
3 highlighting.

4 THE COURT: Let me ask plaintiff, do you have for me
5 today an unredacted version of everything?

6 MS. ARSULOWICZ: Yes.

7 THE COURT: Just -- why don't you just give me that.
8 You can give this back to him. Please. Thank you.

9 MS. ARSULOWICZ: And it would be Exhibit 13 that she
10 was referring to right now, your Honor.

11 Starting on page 7 of that exhibit.

12 (Brief interruption.)

13 THE COURT: All right. So 23 documents refer to
14 commercialization, marketing and sales of the OnStar system.

15 All right. Why don't that also include forecasts?

16 MR. LEAVELL: Your Honor, forecasts are not sales,
17 they are not marketing materials, and it is not
18 commercialization, it is speculative.

19 THE COURT: It is guesstimates

20 MR. LEAVELL: Guesstimates.

21 MS. CUNNINGHAM: Yes. Correct.

22 MR. LEAVELL: And they are always wrong anyway. But
23 we don't think they fall within this. This is referring to
24 actual sales information.

25 MR. VICKREY: Well, your Honor, if I can address

1 that. Even if the actual sales -- I mean, in a Georgia Pacific
2 analysis, hypothetical negotiation, you're talking about date
3 of the infringement. It could be that there are -- they have
4 these wildly speculative but -- belief that this is going to be
5 the best thing ever, and it turns out to be wrong. Their
6 subjective belief at the time is highly relevant to that
7 reasonable royalty analysis.

8 And, conversely, it could be that they don't think it
9 is going to go anywhere, but then it takes off. But,
10 nonetheless, it is their mindset as of the date of the
11 hypothetical negotiation.

12 That's why I do believe that we're correct on not only
13 that, but any damage expert has -- walking through the Georgia
14 Pacific analysis, in the hypothetical negotiation, would have
15 to consider what the parties were thinking about, and --
16 including any projections.

17 But classic -- classic --

18 THE COURT: Have you exchanged expert discovery yet?

19 MS. CUNNINGHAM: No, your Honor.

20 MR. LEAVELL: No, your Honor.

21 MS. CUNNINGHAM: There is (unintelligible) hanging off
22 the Markman order, which has not yet come out.

23 MR. LEAVELL: What we have done, we have served them
24 interrogatories saying, what is your damages theory. They
25 didn't answer it. They didn't provide us any substance at all.

1 So we don't have any basis yet to start working on a
2 rebuttal case. They have asked for all documents our expert is
3 going to rely on. Well, they are the plaintiffs. They should
4 set forth a damages theory.

5 Once they do in an interrogatory, we will then start
6 working with our expert to prepare his rebuttal.

7 If in the process of his rebuttal, he believes that
8 forecasts are relevant to his opinion and he relies on them, we
9 will, of course, produce anything that our expert relies upon.

10 But they are the plaintiff, they haven't even bothered
11 to set forth the damages theory.

12 THE COURT: Well, but one of the issues will be is
13 that they want to make sure that the forecast information that
14 they will -- they might have to contend with is -- you know,
15 that they have had an opportunity to review it with the
16 individuals who knew about it, reviewed it, analyzed it.

17 MR. LEAVELL: Right.

18 THE COURT: And they are going to come back and ask
19 for discovery and want to redepose those people.

20 MR. LEAVELL: Well, your Honor, I understand. And we
21 all know the Georgia Pacific factors very well, Mr. Vickrey and
22 I. They didn't ask for it. I mean, I don't mean to play
23 games. And we're not playing games. We have asked them which
24 requests cover it, and the ones they identify for us don't
25 cover it.

1 MR. VICKREY: Your Honor, if I may, it is no secret as
2 to what our damage theory is in this case. It is not lost
3 profits, it is not price erosion, it is a reasonable royalty.
4 And the notion that projections would not be included in
5 documents that relate to sales, that's -- these companies
6 always project, always project in their financial documents
7 always.

8 So why in the world -- what is the big secret? Why
9 can't they just show us the projections?

10 All -- documents that refer or relate to
11 commercialization, marketing, and sales. Projections certainly
12 relate to sales. It is the projected sales. The projected
13 demand is marketing. Commercialization, projected.

14 So it is not just documents relating to what an expert
15 might rely on, but, I mean, this -- a company, such as OnStar,
16 GM, will routinely, if not quarterly, if not monthly, certainly
17 on an annual basis, project where they are going. And it is
18 even more relevant because we understand that Toyota is going
19 to be switching out of.

20 THE COURT: Well, let me ask.

21 Counsel, I hear that you are not necessarily arguing
22 that it is not relevant but because they did not propound --

23 MR. LEAVELL: Correct.

24 THE COURT: -- a request that you -- you are not
25 required to submit one.

1 MR. LEAVELL: Correct, your Honor.

2 THE COURT: All right. That is the crux of your
3 argument.

4 As I read Document Request 23, it is sufficiently
5 broad enough to include marketing and sales. And under the
6 analysis at issue here, projections would be encompassed by
7 that. So the Court would read that they did in fact request
8 that information and they would be entitled to be provided that
9 information.

10 MR. LEAVELL: Your Honor, can we limit it to the
11 forecast from the relevant time frame?

12 THE COURT: Well, that's the only thing that is
13 relevant, the relevant time frame.

14 What is the relevant time frame?

15 MR. VICKREY: Well, it is --

16 THE COURT: I presume we're going to have a
17 disagreement. And to the extent that I can rule today -- but
18 as -- these cases are usually complicated.

19 MR. VICKREY: Certainly.

20 THE COURT: And relevant time frame is usually the
21 biggest -- one of the biggest issues to contend with.

22 So what is your take on the relevant time frame?

23 MR. VICKREY: My take on the relevant time would be
24 date of issuance of the patent till today.

25 MR. LEAVELL: I think it is a little broad because the

1 -- as Mr. Vickrey said, the relative time frame is the time
2 where reasonable negotiation, hypothetical negotiation or
3 royalty rate would occur which would be either the issuance of
4 the patent or when OnStar first became aware of the patent,
5 which would be the date of the filing, the lawsuit. Those
6 would be the two dates.

7 THE COURT: The actual notice.

8 MR. LEAVELL: Right. So I don't think it goes through
9 today. I don't think it keeps running. It would be that
10 limited time frame, maybe between the issuance of the patent
11 and the filing of the lawsuit.

12 We'll look to see if there is other documents we can
13 produce, but those -- that's the relevant time period.

14 MR. VICKREY: And if I may respond, your Honor, every
15 single damage expert is aware of a document called the Book of
16 Wisdom where you test your analysis based on what -- what
17 trans- -- what actually transpires. And not only that, we have
18 different features, different functionalities that we're
19 accusing. Plus we understand that Toyota is leading the OnStar
20 system. So all of these certainly make relevant their
21 projections. And our 23 doesn't have a time limit on it
22 either.

23 THE COURT: Yes. But the Court will infer a
24 reasonable time period. So you're not entitled to just about
25 anything.

1 MR. VICKREY: Certainly. And we're not going back
2 to -- we're not going back to someone (unintelligible) we can
3 give us everything for the last ten years. I think our
4 patent -- when did our patent issue?

5 MS. ARSULOWICZ: November.

6 MR. VICKREY: November of 2005?

7 MS. ARSULOWICZ: I think so, yes.

8 MR. VICKREY: So --

9 THE COURT: And when did the case get filed?

10 MR. VICKREY: This case was filed in --

11 MR. LEAVELL: '07.

12 MS. ARSULOWICZ: '07.

13 MR. VICKREY: Early '07.

14 THE COURT: And what is your argument, that even with
15 the Georgia Pacific analysis that you would be entitled to the
16 information as of the current time frame?

17 MR. VICKREY: Again, your Honor, the Book of Wisdom,
18 which requires people to see where this is playing out as a
19 reality check, I agree, I fully agree that the hypothetical
20 negotiations should occur the date of first infringement.
21 Nonetheless, as different checks on the methodology, most
22 damage experts will employ the so-called Book of Wisdom.

23 And so we would maintain for, what, a three-year
24 period?

25 (Discussion off the record.)

1 MR. VICKREY: So a three-year period for projections
2 is not unreasonable.

3 And we can even agree to some subset. For example, if
4 they are projecting on a monthly basis, cut it down to
5 quarterly, annual. For right now we don't even know what they
6 are.

7 MR. LEAVELL: And, your Honor, I don't either. I
8 don't even know if we have projectors. I assume we do, but --

9 THE COURT: All right. But you're going to come back
10 then. You have to find out what kind of projections you have.
11 You're going to find out if you -- if they are quarterly,
12 annually, monthly, and we'll deal with it then.

13 If you want to file something in opposition, do so
14 within seven days. And then I'll bring you back the week
15 thereafter, and we'll have a ruling on this.

16 I do know that you have these time frames on
17 discovery. But I also know that Judge Kendall would give me
18 some leeway on these particular issues only.

19 So if you are -- you know, you're not going to get an
20 additional extension on other matters, only on the matters that
21 I am going to be dealing with.

22 MR. VICKREY: Fine.

23 THE COURT: All right. So let's bring you back the
24 week after next.

25 Ms. Pagan.

1 THE CLERK: May 29th.

2 That would be May 29 at 9:30.

3 MR. VICKREY: We're before Judge Kendall that day.
4 I'm not sure what time.

5 THE CLERK: That's 9:00 o'clock.

6 MR. VICKREY: Is it?

7 THE CLERK: Judge Kendall is at 9:00 o'clock.

8 MR. VICKREY: Okay.

9 MR. LEAVELL: So, your Honor, we might -- may be a few
10 minutes late. I guess that's the point.

11 THE COURT: That's fine. All right?

12 MR. VICKREY: And then does your Honor want to address
13 at this point this -- the whole issue of Mr. Young and whether
14 documents for the future depositions will be produced in
15 sufficient time for us to review them?

16 THE COURT: Well, we have got two future depositions.
17 I will tell you that you absolutely need to do a thorough
18 review of the information. It is not something that should
19 happen where the day before -- and I understand 30(b)(6)
20 witnesses sometimes are different. But it really -- the rules
21 still apply that you have to have undertaken a thorough review
22 of the relevant areas to determine whether the production was
23 satisfactory.

24 So I imagine you're going to be doing that before the
25 next deposition.

1 MR. LEAVELL: We're already doing it, your Honor. We
2 went back last week and made sure that we have gotten
3 everything.

4 And there are some more documents that they have
5 produced. What we were going to do is -- the GM process, you
6 might imagine, of producing documents, is pretty slow. They
7 have got a formal system we have to go through.

8 We're going to get those produced. We're willing to
9 push back the depositions if we have to. We'll keep them
10 apprised as to when everything is produced, whether everything
11 is produced, and we will -- and we're certainly trying to get
12 it all to them more than a week before the deposition.

13 And if we produce something less than a week before
14 the deposition, we'll work with them, if we need to move the
15 deposition, in order to do whatever they need to be satisfied.

16 THE COURT: All right. So the Court will grant the
17 relief that within one week prior to any deposition all
18 documents shall be produced after a secondary thorough review.
19 So you have already taken a review.

20 MR. LEAVELL: Right.

21 THE COURT: This will be a secondary review.

22 MR. LEAVELL: Right.

23 THE COURT: But any other issue?

24 MR. LEAVELL: The Mr. Young issue.

25 THE COURT: They want Mr. Young again?

1 MS. ARSULOWICZ: Yeah. Your Honor, this issue in
2 particular, was a case where counsel had the documents the day
3 before.

4 After I had left. They had produced them after I was
5 on a plane to Detroit.

6 MS. CUNNINGHAM: And also counsel -- the same copies
7 of those documents were brought to the deposition. They were
8 produced to her in the PDF format so she could open them up,
9 review them via et al., et cetera.

10 They were brought to the deposition. They were breaks
11 taken during the deposition. And she chose to spend seven
12 hours talking on other subjects, including subjects outside the
13 scope of the 30(b)(6) topics on which that particular witness
14 was noticed, and then chose at the end of the day to say she
15 wanted to reserve additional time beyond those seven hours on
16 the other documents that were produced.

17 It was not a huge set of documents. It was eight
18 documents in particular that were produced on one very small
19 subject and one subset of topics, and she chose not to.

20 So we would ask the Court to not grant this relief in
21 light of the fact that she made a conscious decision to further
22 inconvenience this witness and have him come back and spend
23 more time with her.

24 MS. ARSULOWICZ: Your Honor --

25 THE COURT: Did you question him at all on the

1 documents?

2 MS. ARSULOWICZ: Not the new documents, your Honor.

3 MS. CUNNINGHAM: Yeah.

4 MS. ARSULOWICZ: There were -- and there were 207
5 pages of new documents. Like I said, produced three days after
6 I left.

7 And, your Honor to be honest, I prepare for days for a
8 deposition, and we -- they had done this at every deposition so
9 far. You know, I reviewed documents, make a plan, and then at
10 last minute ambushed with new documents. And I have no -- I
11 have no doubt that it has hindered my ability to take an
12 effective deposition.

13 We told them that we weren't going to let them
14 compromise our depositions any further. And that after the
15 last meet and confer when we told them if you have any
16 documents, give them to us now, don't wait until the last
17 minute, don't wait till the night before, the morning of. And,
18 your Honor, they did it again, and I wasn't willing to
19 compromise the deposition further.

20 THE COURT: Well, but, counsel, you know that the
21 reality is sometimes it does happen, and you do have to take
22 the time out to undertake a cursory review at least, and then
23 ask very broad questions. And maybe it is not going to be the
24 best deposition that you will have taken, but this is not an
25 unusual thing that arises.

1 MS. CUNNINGHAM: And, your Honor, we were willing to
2 delay the dep and give her sufficient time to review the
3 documents. We're willing to delay it if she needed an hour or
4 long to take breaks.

5 Previously in a deposition I was in with her, we did
6 take extensive breaks and told her she could have as much time
7 as she wanted because we wanted to give her adequate time to
8 time to prepare --

9 MS. ARSULOWICZ: (Unintelligible) 45 minutes --

10 MS. CUNNINGHAM. -- so she could -- (unintelligible).

11 MS. ARSULOWICZ: -- the morning of for more documents
12 after they produced documents the day before.

13 MS. CUNNINGHAM: And then -- to just finish my point
14 very quickly, the record reflects that we said she could take
15 additional breaks throughout the day, including a long lunch,
16 just so she could be fully prepared because we did not want her
17 to not feel that she had ample time to prepare for the
18 deposition.

19 THE COURT: But there were over 200 documents? 200
20 pages?

21 MS. ARSULOWICZ: Yes.

22 MS. CUNNINGHAM: My understanding was there were eight
23 documents, and her representation was that it was 207 pages
24 with respect to those documents.

25 THE COURT: That is -- that is a lot of pages to go

1 over after you're probably still preparing for what you knew of
2 weeks in advance.

3 MS. CUNNINGHAM: Your Honor, just for what I know, I
4 have encountered as well, I know that in my particular
5 depositions people brought -- I would say even 500 pages to me
6 the day of, and I have taken breaks throughout the day just to
7 make sure that I at least did some review of those documents
8 and actually question the witness on those documents. That
9 assuming, that after having seven hours with a witness, I would
10 give additional time beyond.

11 We wanted her to at least do a cursory review at a
12 minimum to determine if she even wanted to question the
13 witness, as opposed to just a matter of fact requesting
14 additional time.

15 MS. ARSULOWICZ: Your Honor, there were a lot of --

16 MR. VICKREY: Let me propose a compromise. Your Honor
17 suggested something that this happens -- if -- this will happen
18 from time to time. But I got to tell you, in 26 years of
19 practice I have never seen it happen repeatedly for every
20 single deposition. After a while you get the sense that this
21 is a strategy. It is not, oh, golly, we just found something.

22 In light of that fact, but in light of the fact that
23 we don't want to overburden folks, presumably they have got to
24 be up in Detroit at some point, we'll take a telephone
25 deposition of this fellow on the additional documents. I mean,

1 they are -- they presumably have to go -- go up there for more
2 document issues, what have you.

3 Might I suggest that compromise, your Honor, because
4 counsel --

5 THE COURT: Well, it sounds like a very reasonable
6 compromise.

7 MR. LEAVELL: Your Honor, as long it is a reasonable
8 limit on the initial time. Counsel decided to take the full
9 seven hours that she's allowed under the rules. I think
10 another half hour an hour --

11 THE COURT: Why would you need more than one hour?

12 MR. VICKREY: More than one hour is fine.

13 THE COURT: One hour.

14 MR. VICKREY: We'll do it.

15 THE COURT: One hour limitation.

16 MR. VICKREY: Yeah.

17 THE COURT: Telephone deposition.

18 MR. VICKREY: That's fine.

19 THE COURT: Okay.

20 MR. VICKREY: And then we'll arrange to have the
21 exhibits in counsels's hands so we can just flip through those
22 and address them telephonically.

23 THE COURT: Doesn't mean you have to take the whole
24 hour, but it means you have up to --

25 MS. ARSULOWICZ: I just want a chance to ask about the

1 new documents.

2 THE COURT: I understand that.

3 All right. Anything else that we can resolve this
4 morning?

5 MR. VICKREY: I think not, your Honor.

6 THE COURT: All right.

7 MS. CUNNINGHAM: Just to clarify, your Honor, you
8 mentioned a topic or at least a couple topics you want us to
9 possibly brief. Could I just clarify to make sure I know which
10 ones you wanted briefing on?

11 THE COURT: Well --

12 MS. CUNNINGHAM: I think it was the forecast --

13 THE COURT: -- I want the briefing on the forecast
14 documents.

15 But we're going to hear about the Book of Wisdom a
16 little bit more I imagine, so you can deal with the Book of
17 Wisdom and why you believe that the Book of Wisdom is not going
18 to give them any reason to ask for these forecast documents.

19 MS. CUNNINGHAM: Okay.

20 THE COURT: That's a specific issue, a specific legal
21 issue to deal with.

22 So we're dealing with a time factor of forecast
23 documents.

24 You can continue to argue whether or not they are
25 relevant at this stage at all, if that's what you so choose to

1 do.

2 I read Document Request 23 to be fairly broad.
3 Although there isn't a time limitation, the Court will impose a
4 time limitation. The big issue is what will that time
5 limitation be.

6 There was also a suggestion that some summaries can
7 be -- summaries of the forecasts, for example, quarterly,
8 annually versus whether they are normally done weekly or
9 monthly.

10 And I know counsel was going to make a determination
11 after talking to those who know more as to whether or not there
12 are said summaries.

13 MR. VICKREY: And, your Honor, hopefully we can try
14 to --

15 THE COURT: You can continue to talk.

16 MR. VICKREY: Yeah.

17 THE COURT: There is nothing to forbid you.

18 MR. VICKREY: Because if Mr. Leavell comes back to me
19 and says, hey, Paul, this is what we have got, I'll say, well,
20 why don't you make it two and a half years, Craig.

21 MR. LEAVELL: We'll work it out.

22 THE COURT: I have no doubt that you will work it
23 out. You -- both sides seem to be very reasonable and
24 responsible while being strong advocates for your clients. But
25 these issues, my guess is, could be worked out.

1 If you want to file something, do so within seven
2 days. I'll bring you back. I think the date that Ms. Pagan
3 has already given you is the end of the month, and we'll see
4 where we are then.

5 MR. VICKREY: Thank you, your Honor.

6 MS. ARSULOWICZ: Thank you, your Honor.

7 THE COURT: All right. Thank you very much.

8 (Which concluded the proceedings in the above-entitled
9 matter.)

10
11 C E R T I F I C A T E

12
13 I hereby certify that the foregoing is a transcript of
14 proceedings before the Honorable Maria Valdez on May 15, 2008.

15 DATED: May 30, 2008
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